

FOURTH AMENDMENT RIGHTS PROTECTION ACT

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House Bill 4430 as enacted
Public Act 71 of 2018
Sponsor: Rep. Martin Howrylak
House Committee: Judiciary
Senate Committee: Judiciary
Complete to 6-19-18

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: House Bill 4430 would create the Fourth Amendment Rights Protection Act to restrict when the state may assist a federal agency in obtaining a person's electronic data or metadata.

FISCAL IMPACT: The bill would have no direct fiscal impact on the state or local governments.

THE APPARENT PROBLEM:

According to committee testimony, federal surveillance is increasing and spreading to a person's data and metadata. Because there is a reasonable expectation of privacy in this data, collection of it is protected under the Fourth Amendment right against illegal searches and seizures. Legislation has been offered to prohibit Michigan from assisting federal agents in any collection of illegally obtained electronic information.

THE CONTENT OF THE BILL:

Under the proposed new act, the state, or a political subdivision of the state, would be prohibited from assisting, participating with, or providing material support or resources to a federal agency in the collection or use of a person's *electronic data* or *metadata* unless one or more of the following circumstances apply:

- The person whose data or metadata are being collected or used gives informed consent to that collection or use.
- The action is conducted under a warrant that is based upon probable cause and particularly describes the person, place, or thing to be searched or seized.
- The action is in accordance with a legally recognized exception to warrant requirements.
- The action will not infringe on any reasonable expectation of privacy the person may have.
- The state or political subdivision of the state collected the electronic data or metadata legally.

Electronic data would mean information related to an electronic communication or the use of an electronic communication service, including the following:

- The contents, sender, recipients, or format of an electronic communication.

- The precise or approximate location of the sender or recipients of an electronic communication at any time during the communication.
- The time or date the communication was created, sent, or received.
- The identity of an individual or device involved in the communication, including, but not limited to, an internet protocol address.

Electronic data would specifically exclude subscriber information.

Metadata would mean information generally not visible when an electronic document is printed, describing the history, tracking, or management of the electronic document, including information about data in the electronic document that describes how, when, and by whom the data were collected, created, accessed, or modified and how the data are formatted. **Metadata** would specifically exclude any of the following:

- A spreadsheet formula.
- A database field.
- An externally or internally linked file.
- A reference to an external file or hyperlink.

The bill would take effect 90 days after its enactment.

ARGUMENTS:

For:

A person's data and metadata could be extremely personal and private, kept away from public view. The Supreme Court of the United States has ruled many times that a person has a right to privacy, and when the government wants to intrude on that privacy for any reason, probable cause must be present and a warrant must be obtained or a warrant exception must apply.¹ This bill would codify a person's privacy rights to their data and metadata to protect against warrantless searches lacking probable cause and to ensure that Michigan agents will not assist federal agents in illegal seizures of data and metadata.

Against:

Concerns were raised about the interpretation of specific language when the bill was in House committee. Under the introduced and H-1 versions of the bill, officers would be allowed to assist federal agents, but only in three specific circumstances, all of which pertain to a warrant exception under the Fourth Amendment. This could be interpreted as prohibiting assistance under any other circumstance, even if the assistance is legal or required under another part of the law. For instance, the state is required to share with the federal government information relating to auto accidents. Autonomous vehicles and their

¹ See, generally, *Riley v. California*, 573 U.S. ____ (2014) (a warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional); *U.S. v. Jones*, 565 U.S. 400 (2012) (installing a GPS tracker to monitor a vehicle's movement is a search under the Fourth Amendment and requires a warrant or exception); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (consent is required for search and seizure without a warrant, including given by a proper third party); *Katz v. U.S.*, 389 U.S. 347 (1967) (there is an expectation of privacy on phone calls, even if made in public).

technology are on the rise, and critics of the bill were concerned that if an autonomous vehicle were involved in an auto accident, the bill's language would interfere with the requirement to share information, which would be obtained without informed consent or a warrant and thus would be outside the scope of a warrant exception.

Response:

The S-1 substitute, which is the version of the bill that was enacted into law, contains an exception for data or metadata legally collected by a state or local unit, which presumably answers this concern with earlier versions of the bill.

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